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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 1681 Criminal

AUG 16 1968

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL S. HEGNER, ESQ.
HEGNER, HEGNER & PHILBIN
Attorneys at Law

Suite 1402 Electronics Capital Building
110 West "C" Street
San Diego, California 92101

Attorneys for Appellant,
EDWARD EUGENE QUALIN

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Suite 1402 Electronics Capital
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110 West "C" Street
San Diego, California 92101

Attorneys for Appellant,
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I

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging Appellant guilty of both counts on a two count indictment. The indictment filed on September 13, 1967 charged the Appellant in count one with knowingly smuggling and clandestinely introducing into the United States from the Republic of Mexico approximately 80 pounds of marihuana contrary to law and in violation of United States Code Title 19, Sections 1459, 1461, 1484 and 1485; and, in count two with knowingly concealing and facilitating the transportation and concealment of said marihuana that the Appellant then and there well knew had been imported and brought into the United States

contrary to law and in violation of United States Code, Title 21, Section 176a.

Judgment following trial by court found Appellant was guilty as charged in count one and in count two and was entered on October 26, 1967.

Appellant Qualin was sentenced to prison, under Section 5010e of Title 18, United States Code Annotated, for a 60-day observation period. He was found to be suitable for treatment under the Federal Youth Corrections Act (Transcript of record, p. 17) and on January 15, 1968, following the study under Title 18, United States Code Annotated, Section 5010e, he was returned to the court, and, therefore committed to the custody of the Attorney General for treatment and supervision under Title 18, United States Code, Section 5010b, on both counts to run concurrently. (Transcript of record, p. 18)

A timely Notice of Appeal was filed on behalf of Appellant on January 22, 1968, and on the same date, an order was filed permitting Appellant to proceed in forma pauperis. (Transcript of record, pp. 20, 21)

The District Court has jurisdiction pursuant to the provisions of Title 18, United States Code, Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, United States Code, Sections 1291, 1294 and Rules 37 and 29 of the Federal Rules of Criminal Procedure. (Title 18, United States Code)

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II

STATEMENT OF CASE

Appellant Qualin was indicted on September 13, 1967 on two counts under Title 21, United States Code, Section 176a (smuggling and concealing marihuana0. Count one charged Appellant with knowingly importing marihuana into the United States from the Republic of Mexico contrary to law. Count two charged Appellant Qualin with knowingly concealing and facilitating the transportation of marihuana contrary to United States law. Appellant entered a plea of not guilty as to both counts.

Following trial by court Appellant was found guilty on both counts. Appellant did not move for a new trial, however, since trial was by court and not by jury, counsel for Appellant argued the insufficiency of the evidence to sustain a verdict of guilt as to both counts. (Rptr. tr. pp. 67-68) Therefore, it is submitted that there was no error by failure to move for a new trial. Appellant was sentenced and committed to Lompoc, California.

Appellant appeals.

III

SPECIFICATION OF ERRORS

1. The court erred in finding the Appellant guilty of both counts because there was insufficient evidence to show that Appellant had knowledge of the contents of the automobile.

2. There was entrapment as a matter of fact.

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IV

STATEMENT OF THE FACTS

Approximately two days prior to August 9, 1967, Appellant Qualin was approached by Jackie Ray Bailes and asked if he would like to make $100.00, to which Appellant answered "yes." (Rptr. tr. p. 51, lines 19-21) Appellant did not ask how he was to make $100.00 nor was he offered any statements to the effect of how he was to earn the said $100.00. (Rptr. tr. p. 52, lines 7-14) Jackie Ray Bailes, accompanied by Appellant, went to Freddie's Bar in Tijuana, Mexico. (Rptr. tr. p. 52, line 17). Jackie Bailes testified that he did not know Appellant well, but had known him for approximately one month. (Rptr. tr. p. 53, lines 1-2) Jackie Ray Bailes then sent Appellant down in the bar and went and contacted a "Mr. Harris." (Rptr. tr. p. 53, lines 7-8) Jackie Bailes did not introduce Mr. Harris to Mr. Qualin, nor in any way have any conversations with either of them. (Rptr. tr. p. 53, lines 7-15) Bailes talked to Harris, pointed out Appellant to Harris and then left the bar. (Rptr. tr. p. 53, lines 18-19). Bailes never told Appellant what type of business Harris was in. (Rptr. tr. p. 55, lines 24-25; p. 56, lines 1-7) Jackie Ray Bailes was an undisclosed informant and he transferred the information concerning Harris' 1967 El Camino Chevrolet pickup to Clarence A. Spohr of the United States Customs Service on August 7, 1967.

On August 9, 1967, Harris' 1967 El Camino Chevrolet truck was stopped at the San Ysidro border crossing at approximately

7:00 o'clock a.m. by Inspector Raymond A. Larson. (Rptr. tr. p. 23, lines 2-9). Inspector Larson had the license number and description of the 1967 El Camino Chevrolet pickup truck on his "hot sheet", and therefore, referred it to the secondary inspection area. (Rptr. tr. p. 34, lines 9-25; p. 35, lines 1-12)

Appellant driver appeared to have been drinking or under the influence of some sort of sedative. (Rptr. tr. p. 23, lines 20-25) An inspection of the vehicle showed newly spotted nuts and bolt in the bed of the truck. (Rptr. tr. p. 24, lines 3-7) Appellant Qualin was removed from the vehicle and taken inside the Customs building while the truck was searched. (Rptr. tr. p. 25, lines 2-5) Thirty-eight kilograms of marihuana was discovered in the bed of the truck. (Rptr. tr. p. 25, lines 16-17) A personal search of Appella revealed no contraband on or about him. (Rptr. tr. p. 25, lines 2-5)

Agent Spohr interrogated Appellant and when asked if he could account for the large amount of marihuana in the truck, Appellant stated "no" that he "borrowed that car from a man by the name of Don and . . . was going to San Diego and leave the car at Fifth and G." (Rptr. tr. p. 61, lines 9-12) Appellant further explained that on the 8th he was in Tijuana and had gone to the Blue Note where he had met a girl whose name he did not recall, but that she lived in Pacific Beach (a suburb of San Diego) somewhere. They were together most of the evening, but she didn't have a place to stay. He met Don, the person he had known for two days, at which time Don had loaned him some money for a motel. That they had

gone to the motel and after getting the girl situated in the motel he left, went on back downtown (Tijuana) and decided to go to San Diego. He met Don and asked if he could borrow his car, to which Don had replied "yes", that it was parked across the street from the Chicago Club in Tijuana. He stated that Don had told him to leave the car in San Diego, that he was going up with someone else. (Rptr. tr. p. 61, lines 9-25; p. 62, lines 1-4.

V

ARGUMENT

A

INSUFFICIENT EVIDENCE FOR CONVICTION

The government failed to sustain its burden of proof sufficient to convict the Appellant of counts one and two of the indictment. The government did not present sufficient evidence to show that Appellant Qualin had knowledge of the contraband within Harris' automobile as required in "possession" of narcotics.

In the case of Evans v. United States, 257 F2d 121, it states:

> "A person has a narcotic in his possession if he knows of its presence and has control of it, and knowledge and control may be proved circumstantially."

On both direct and cross-examination the record is void of any showing that Appellant had knowledge, dominion or control of the narcotics contained within the paneling of the truck registered in the name of Don Harris. There were no statements or debris on Defendant which could connect or link him to the possession of said narcotics.

In Bass v. United States, 326 F2d 884, it states:

> "Both control and knowledge are necessary for the crime of unlawful possession of a narcotic. Knowledge of presence plus control over marihuana amounts to possession sufficient to raise a presumption of guilt. 26 USCA 4741, sub. a2, 4744 sub.a."

In United Stats v. Mills, 293 F2d 609, it states:

> "Offense of knowingly facilitating sale of heroin imported contrary to law was not established, where government failed to show that defendant, who was never shown to have had possession or control of heroin, knew that heroin sold had been unlawfully imported into the United States."

In the case at bar, the testimony of the undisclosed informant, Jackie Ray Bailes, indicates that Appellant Qualin was never appraised of the contents of the truck by Bailes himself; tha all he was appraised of was that he could "earn $100.00."

It is further submitted, that Bailes' testimony, as a government witness, indicates that Qualin had never met Harris befo and that Bailes pointed Qualin out to Harris and sent Harris over to him while in a bar in Tijuana. Further testimony indicates that Bailes then left and had no knowledge of what transpired between Harris and Appellant.

Appellant further contends that since none of the conversations between Appellant and Harris was submitted to the Court, that there is no knowledge that the man known as Harris informed Appellant of the contents of the truck and that it cannot be

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Appellant further contends that since none of the conversations between Appellant and Harris was submitted to the Court, that there is no knowledge that the man known as Harris informed Appellant of the contents of the truck and that it cannot be

presumed that Mr. Harris informed Appellant that the truck, in fact contained contraband contrary to the Laws of the United States. At most, the Government was able to prove that Appellant was intereste in earning $100.00; however, this in itself, is merely a suspicious circumstance and not sufficient to show the knowledge required at law before possession of a narcotic may be established, and that the testimony of the Government's witness, Spohr, indicates that in interrogation Appellant denied any knowledge of the marihuana in the car.

In the case of People v. Foster, 115 CA2d 866, it states:

> "Mere presence at the scene of the crime, standing alone, is not sufficient to justify a finding of guilt. The crime of possession of narcotics requires a physical or constructive possession of actual knowledge of the presence of the narcotic substance."

It is further stated in the case of People v. Estrada, 234, CA2d 136:

> "Proof of defendant's opportunity of access to a place where narcotics are found, without more, will not support a finding the defendant's unlawful possession of narcotics."

In federal law, the definition of possession was set forth in the case of Arellanes v. United States, 302 F2d 606, in which it is stated:

> "This court has on many occasions passed upon the meaning of the word possession as used in 21 USC annotated, 174 and 176a. The meaning as defined in the cases is a "dominion and control . . . so as to give power of disposal of the drug." (Rodella v. United States, 286 F2d 306)

Proof of exclusive control of dominion over property on which contraband or narcotics are found is a strong circumstance tending to prove knowledge of the presence of such narcotics and control thereof. (Evans v. United States, 257 F2d 121, Ninth Circuit

> "On the other hand, near proximity to the drug, mere presence on the property where it is located or mere association without more, with a person who does control the drug or the property on which it is found is insufficient to support a finding of possession." (People v. Antista, 129 CA2d 47)

In the California case of People v. Bledsoe, 75 CA2d 862, possession as used in criminal law was defined as follows:

> "In a prosecution for possession of marihuana in violation of Health & Safety Code Section 11160 the evidence failed to show defendant's knowledge of the presence of the drug to justify a finding of 'knowledge' to satisfy the terms of the statute, where it appeared that the automobile in which the drug was found had been used by another in perpetration of a robbery in another city, that defendant had not used the car since it had been returned, and that others beside him had occupied the car at the time of and immediately following the arrest.
>
> "The appellant grounds his appeal on the failure of the state to prove knowledge and possession. The respondent rests the case upon the failure of the appellant to call other witnesses to substantiate his testimony, and upon the inference, which in this case is a mere suspicion, that, because the appellant had in his possession the key to the car, he must have had possession of the narcotic. (Emphasis added.)
>
> "The distinction which must be drawn from a reading of the foregoing authorities is the distinction between (1) knowledge of the character of the object and the unlawfulness of possession thereof as embraced within the concept of a specific

intent to violate the law and (2) knowledge of the presence of the object as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the possession denounced by the statute. It is knowledge in the first sense which is mentioned in the authorities as being immaterial but knowledge in the second sense is the essence of the offense."

B.

THERE WAS ENTRAPMENT AS A MATTER OF FACT

In Sorrells v. United States, 287 US 435 (1932), the Court gave its first recognition to the defense of entrapment; but the injustices reaching this result did so by two different routes. Mr. Chief Justice Hughes, speaking for the majority, thought that the defendant was not guilty of violating the statutes in question since "its application in (these. . . circumstances. . . is foreign to its purpose) and/ . . shocking to the sense of justice." (Id. at 446) Mr. Justice Roberts, with whom Justice Brandice and Justice Stone concurred, found an affirmative defense which "attributes no merit t a guilty defendant," but is based on the court's power to preserve "the purity of its own temple" by preventing the uses of its process to consummate a wrong. (Id at 455, 457) (Concurring opinion)

The criterion of entrapment, which is one general acceptance, is the "origin of intent," which allows the defense if the criminal act was "the product of the creative activity" of law enforcement officials. (Sorrells v. United States, 287 US 435, 451 (1932)) Courts applying this test make two inquiries: whether there was inducement on the part of the government official, and if

so, whether the defendant showed any predisposition to commit the offense. (United States v. Sherman, 200 F2d 800, 882 (2nd Cir. 1952)

The second majority view, which is exemplified by the concurring opinions in Sorrells and Sherman adopt an objective test, whereby the Court considers only the nature of the policy activity involved, without reference to the predisposition of the particular defendant. Thus, police conduct which "falls below standards to which common feelings respond for the proper use of government power." (Sherman v. United States, 356 US 369, 382 (1958)) would bar a conviction.

Applying any one of the above tests to our present case would seem to entitle Appellant Qualin to the defense of entrapment as a matter of fact, because the testimony at trial did not indicate that Appellant Qualin had any predisposition to commit a crime until he was approached by the undisclosed informant Bailes. In Raley v. Ohio, 360 US 423, it states:

> "When society, through its law enforcement officials has been the cause of an individuals action, it seems unjust for society to punish him."

In the recent case of Javier Carbajal-Portillo, Rafael Vega-Picos v. United States, Ninth Circuit No. 21855 and 21855-A, quoting Notaro v. United States, 363 F2d 169, 173 (Ninth Circuit 1966), Judge Elly noted that in Sorrells, supra, "it was not thought to be right and just that a government should instigate and successfully pursue prosecution for the commission of an act which the

prosecuted would not likely have committed, but for the importunity of an agent of the government itself." (Emphasis added)

Appellant Qualin respectfully submits that if Mr. Harris had talked to Appellant, who had no predisposition to commit a crime in violation of 21 United States Code Annotated, 176a, that there was entrapment in fact under the theory of agency because Bailes, the undisclosed informant, was an agent of the government and acting as an agent of Mr. Harris as well, and that in his capacity as an agent for the government, Mr. Bailes was to inform the United States Customs of the importation of marihuana into the United States contrary to United States Law, and that the evidence shows that the informant, Bailes, had knowledge that Harris was engaged in said illicit traffic. However, Harris could not import the marihuana into the United States without a driver for his truck. As Harris' agent Bailes was required to find a prospective driver. The testimony indicates, in fact, that Bailes did find Appellant Qualin, asked him if he was interested in making a $100.00, set him down in a bar in Tijuana, Baja California, and then procurred Harris, and sent Harris over to Appellant Qualin. There was no testimony by Mr. Bailes to indicate how many different men he had introduced to Mr. Harris and there is no testimony as to how many men did, in fact, drive a truck for Mr. Harris, nor is there testimony to indicate if any men refused to drive a truck for Mr. Harris

Appellant further respectfully submits that an agent is bound by the acts of his principal as equally as the principal is

bound by the acts of the agent.

It is further respectfully submitted that if Bailes had been the one to talk to Appellant Qualin, offered him the money, indicated that it could be earned by driving a car containing contraband into the United States and then, in turn, had informed the government as its agent of this action that an entrapment in fact and at law would have occurred.

It is respectfully submitted that an entrapment in fact occurred because even though Mr. Harris was the one who employed Mr. Qualin to drive the truck across the border it was the government's agent who placed Appellant into contact with Mr. Harris with the knowledge that Mr. Harris was involved in an illegal enterprise with the hopes that Mr. Harris could employ Appellant to transfer the contraband from Mexico into the United States of America.

The evidence at trial is devoid of any further conversations between Mr. Harris and informant Bailes, but it seems logical to infer that the information reached Mr. Bailes, that the truck would in fact, enter the United States at a particular time and this information then was passed to the United States Customs officials and the subsequent arrest of Appellant Qualin was made.

Appellant respectfully submits that the crime in violation of 21 United Sates Code Annotated, 176a was created by the informant, Mr. Bailes, in that there is no evidence to show that Mr. Harris was willing to transport the narcotic himself and that the evidence

logically infers that this knowledge was possessed by Mr. Bailes and in order to work in his capacity as an undisclosed informant and agent for the United States Government it was incumbent upon him to search for and procur an individual whom he felt might likely become an employee of Mr. Harris. The facts further indicate that during the conversations between Mr. Harris and Appellant, Mr. Harris in some way did, in fact, induce him to drive the truck into the United States from Mexico.

Appellant respectfully submits that under the doctrine of entrapment that this is the very type of crime which comes within the umbrella of protection because, in essence, the crime was created and executed by the very same government which prosecuted the crime.

VI

CONCLUSION

Because of the foregoing argument, the oral and documentary evidence received at trial, and the obvious instigation of a crime by an agent of the government, it is respectfully submitted that the judgment as to Qualin be reversed.

Respectfully submitted,

HECSH, HEGNER & PHILBIN

Michael S. Hegner

MICHAEL S. HEGNER
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

Michael S. Hegner

MICHAEL S. HEGNER